
U.S. Department of Labor
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, NJ 08104

DATE: January 22, 1997

CASE NO: 96-ERA-0017

In The Matter Of

SYED M. A. HASAN,
Complainant

v.

INTERGRAPH CORPORATION
Respondent

Appearances:

SYED M. A. HASAN
Pro Se

Sidney F. Lewis, Esq.
On Behalf of the Respondent

Before: Paul H. Teitler
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 210 of the Energy Reorganization Act ("ERA") of 1974, 42 U.S.C. § 5851 (1982) (hereinafter "the Act"), which prohibits a Nuclear

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Regulatory Commission ("NRC") licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. The Act, designed to protect so-called "whistleblower" employees from retaliatory or discriminatory actions by their employers, is implemented by regulations found at 29 C.F.R. Part 24.

On February 6, 1996, Syed M. A. Hasan (hereinafter "Complainant") filed a complaint with the Office of the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor. The Complaint alleges "(a) Discriminatory Denial of Employment by Intergraph Corporation" and "(b) Violations of the Energy Reorganization Act (Section 211)." (CX[1] 6) Specifically, Complainant alleges that he engaged in activity protected under the Act prior to applying for a job with Intergraph Corporation ("Respondent"), that Respondent knew about his protected activity, that Respondent denied him employment, and that Respondent's denial of employment was based on its knowledge of his protected activity. (CX 6)

On April 2, 1996, the District Director, Wage and Hour Division, Employment Standards Administration ("District Director"), issued a decision dismissing the complaint. The District Director found that Complainant failed to establish a prima facie case of discrimination and that Respondent "demonstrated by clear and convincing evidence that their decision not to hire [Complainant] was due to the filling of the position internally and that the same action would have taken place in the absence of the `protected activity' that [Complainant] alleged occurred more than ten years ago." (RX 6)

Complainant exercised his right of appeal, and a formal hearing was held in Huntsville, Alabama before the undersigned on June 18, 1996. Complainant appeared *pro se,* and testified on his own behalf. Respondent presented the testimony of three of its own employees, Lee Oatley, LaVor Haynie, and Stephen Spray, and each was subject to cross-examination by Complainant.

Complainant submitted 16 exhibits, which were entered in the record as CX 1 through CX 16, and Respondent submitted 6 exhibits, entered as RX 1 through RX 6. Both Parties filed closing argument on August 29, 1996.

[Page 3]

STATEMENT OF THE CASE

Complainant is a Structural/Civil Engineer with 23 years of experience in the design, construction, and inspection of pipes and pipe supports in nuclear power generation facilities throughout the United States. He holds bachelor's degrees in Civil Engineering, Physics, and Mathematics from Karachi (Pakistan) University (TX 13), and is a candidate for certification as a professional engineer in the State of New York. (TX 14)

Complainant's employment in the nuclear power generating industry is detailed in his resume which he forwarded to Respondent under cover of October 15, 1995. (CX 2)

Complainant's employment history is also contained in an application form he filled out for the Respondent on December 20, 1995. (CX 4) The resume includes his work with Stone & Webster Engineering Corp. ("Stone & Webster") at the Beaver Valley and North Anna Nuclear Projects from 1969 through 1974, Burns & Roe, Inc. at the Clinch River Breeder Reactor Plant from 1974 through 1979, and Nuclear Power Services, Inc. at the Catawba, South Texas and Comanche Peak Projects from 1979 through 1985. (CX 2) Complainant's most recent employment, listed on the application form, was with Bechtel Corporation from October, 1986 through May, 1994. Complainant described his duties at Bechtel as "designer/checker/design reviewer on pipe supports design for various nuclear power plants." (CX 4 at 3.)

Complainant alleges that he first participated in activity protected by the employee protection provisions, or "whistleblower" provisions, of the Act while working for Nuclear Power Services at Comanche Peak, from 1982-85. Complainant testified that he raised "many technical concerns, safety-related concerns" on the Comanche Peak Project, which, he opined, "is, in my judgement, at that time, and even today, perhaps, the worst nuclear project I ever worked." (TX 38)

Complainant testified that around July or August, 1985, Texas Utilities Electric ("Texas Utilities"), owners of Comanche Peak, contracted a large portion of work which had previously been performed by Nuclear Power Services, his employer at the time, to Stone & Webster, for whom Complainant had worked from 1969 through 1974. Texas Utilities "allowed" Nuclear Power Services' employees to interview with Stone & Webster, and Complainant alleges that Stone & Webster refused to rehire him based on negative recommendations from Texas Utilities and Nuclear Power Services. (TX 39) Complainant explained that these negative recommendations were given because he raised safety concerns and "because in those days Texas Utilities Electric was considering me as a spy of a particular lady who was an opponent of the nuclear facility." (TX 38)

Based on this alleged retaliation, Complainant made a claim under the Act against Nuclear Power Services, Stone & Webster and Texas Utilities Electric. A hearing was held before Administrative Law Judge ("ALJ") Alfred Lindeman, who issued a Recommended Decision dismissing the complaint on October 21, 1987. (RX 6) The Secretary of Labor issued a Final Decision

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and Order dismissing the case on June 26, 1991. (RX 6). Complainant alleges that newspaper publicity surrounded this case, and may have been a source of knowledge by Respondent employees, and specifically Alain Mouyal, of Complainant's protected activities.

In 1986, Complainant began work for the Bechtel Corporation, and worked at the South Texas Project, Arkansas Nuclear One Project, Grand Gulf Nuclear Station,

Brown's Ferry Nuclear Project, and Watts Bar Nuclear Project. (CX 2 at 4) While at Watts Bar as a lead review engineer in 1990, Complainant was cited for his "extensive efforts and tireless dedication" in a Certificate of Appreciation which he was awarded. (CX 2 at 8; TX 31, 35)

From May, 1988 to April, 1989, Complainant, while a Bechtel employee, was assigned to work at Grand Gulf Nuclear Station for System Energy Resources, Inc. ("SERI"), owner of the station. While working for SERI, Complainant raised internal safety complaints with his supervisors, and also wrote letters, expressing those concerns, to the NRC. (See Recommended Decision and Order of Judge Levin, RX 6) Complainant was released, or did not have his contract renewed, by SERI in April, 1989, and was assigned to Bechtel's Gaithersburg, Maryland offices. Complainant filed another claim of retaliation under the Act. (RX 6) ALJ Stuart A. Levin issued a Recommended Decision and Order dismissing the case on August 2, 1989, and the Secretary of Labor issued a Final Decision and Order dismissing the case on September 23, 1992. (RX 6)

From April, 1989 through October, 1989 Complainant worked for Bechtel at Brown's Ferry, where he was the Principal Reviewer of the pipe support and analysis and design packages. He was also responsible for responding to many Tennessee Valley Authority ("TVA") audit findings. From October, 1989 through April, 1990, Complainant worked for Bechtel as the Lead Review Engineer on the Watts Bar Nuclear Project. In this function, he was second only to the Pipe Support Group Leader, and he was involved in interpreting the clients' technical requirements and providing clarification and guidance to other engineers within his group. From April, 1990 through August, 1990, Claimant served as Senior Engineer and Review Group Leader on the Palisades Nuclear Project for Bechtel.

Following his tenure with Bechtel, Complainant brought three separate actions against Bechtel under the Act. After proceedings before me, these claims were settled and the settlement was approved by the Secretary of Labor. (RX 6, TX 78)

Complainant testified in some detail regarding the skills he developed and computer programs he became proficient at during his seven years as a senior engineer for Bechtel. He

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used "various finite element computer programs" such as FABS, Base Plate II, Display II, CONAN, Dedelock, and STRUDL (which, Complainant explained, stands for Structural Design Language). (TX 21-25) Complainant explained that these are all "in-house" programs, which "can only be effectively utilized by any human being only and only when he is a part of the company" and are "proprietary products of that company [which] you ... cannot go in the market and buy." (TX 24) For example, with regard to STRUDL, Complainant explained that it was developed at Massachusetts Institute of Technology around 1970, and companies have made their own modifications and enhancements to the

program for use in that company, and therefore it comes in "various forms and shapes." (TX 25)

In October, 1995, Complainant submitted a cover letter and resume to Respondent in application for a position as a Reviewer of Structural Engineering Programs in the Quality Assurance Department.[2] (CX 2) In the cover letter, Complainant stated that he was willing to work in any part of the United States and overseas. (CX 2) Along with the cover letter and resume, Complainant submitted the Certificate of Appreciation which he was awarded while working for Bechtel at the Watts Bar Nuclear Plant in February, 1990, as well as a recommendation from James W. Heubach, Bechtel's Human Resources Manager, dated May 6, 1994. The recommendation states, in part: "While employed by Bechtel, [Complainant] performed his duties as an engineer in a satisfactory manner. In performance ratings, he was deemed to have met or exceeded all applicable job performance criteria during his tenure as a Bechtel employee."

In late November and early December, 1995, Respondent's Process and Building Solutions Process Center (PBS) forecast a potential opening for a Structural Engineer. Respondent's PBS Training Department Manager, Lee Oatley,[3] began collecting resumes and conducting telephone interviews of prospective employees. Complainant was among those interviewed by telephone. (TX pp. 45, 104-105)

On December 20, 1995, Complainant was granted an "on-site" interview with Respondent at the corporate headquarters in Huntsville, Alabama. The interview process consisted of filling out an application for employment (CX 4) followed by a series of interviews with Mr. Stephen Spray, Senior Human Resources Representative for Respondent, Mr. Oatley, Nadia Carey, Alain Mouyal and Lavor Haynie, members of Respondent's management and non-management technical personnel. (TX 108; CX 16)

Complainant testified that he arrived at Spray's office as scheduled between 12:00 and 12:30 p.m., and was met by Spray at approximately 12:35. Complainant testified that Spray gave him an application, told him that he had just 15 minutes to

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complete the application, and sat next to him while he completed it. (TX 47, 58-59) Complainant testified that after he filled out the application, Spray thanked him for coming, and Complainant had to remind him that there were supposed to be "technical" interviews. (TX 47) Spray and Complainant proceeded to a meeting with Lee Oatley at Respondent's Building 24A. (CX 16)

Spray testified at the hearing. Spray denied that Complainant was given a limited time to complete the application, and denied that he sat with Complainant while he completed the application. (TX 214-215)

Complainant testified that he met with Lee Oatley after meeting with Spray. Oatley had previously spoken with Complainant over the telephone. Complainant testified that his on-site interview with Oatley was scheduled for 1:45 p.m., (CX 16) but began at approximately 1:30 p.m. (TX 48) Complainant testified that Oatley did most of the talking, and gave him an overview of the company, "a very step-by-step way, what his organization does and other things." (TX 62)

Lee Oatley testified at the hearing and explained that he was, at the time of Complainant's interview, Manager of the Training Department, Process and Building Solutions Division of Respondent, and had been so for one month. (TX 102-103) In the autumn of 1995, he was tasked with filling approximately six openings for chemical, electrical, and civil engineers with process plant design experience. (TX 104)

In addition, Oatley had been informed of a possible opening for a structural engineer to replace his existing structural analyst, Nadia Carey, who was considering leaving the company[4] (TX 105) It was in this context that he contacted Complainant by telephone. (TX 105)

In the wake of his first telephone interview with Complainant, Oatley testified that he had some concerns: "Well, I felt like I didn't really have a good handle on his structural credentials, whether or not that experience was broad enough to apply to the work that we do;...I felt like communications were difficult." (TX 107-108) Oatley stated, "After we had this conversation, in spite of those weaknesses, I said that we would conduct an on-site interview and that I would have Steve Spray get in touch with him to arrange the date and time." (TX 108) Oatley testified that his face-to-face interview on December 20, 1995 did not ease his concerns:

> My impressions of [Complainant] were that he did not ask very many questions, as I would expect most of our candidates to ask. He nodded a lot, smiled a lot, and agreed a lot, but didn't really have any questions; was difficult to get to talk.

[Page 7]

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> I had the opinion that he probably wasn't a fit in our organization ... because the positions we have require good communications skills. They require not only the application of structural expertise, but also the accumulation of computer graphics expertise; I felt we had a real problem there.

(TX 110-112) Oatley continued:

> My conclusion was that [Complainant] would have difficulty understanding the problem that the customer was describing [at the help desk]; and, therefore, would have difficulty trying to devise a solution for it.

(TX at 116)

Oatley also testified that he eventually concluded that an internal transfer of Respondent employee Doug Grant would be a better option to fill the potential opening. (TX 117, 163-164) Oatley testified that, "Mr. Grant had a very steep learning curve that he had accomplished, he had a history of learning new things very quickly; he had excellent communications skills;... He did not need to work, necessarily, under the tutorship or as a support for somebody else, he would take a leadership role..." (TX 164)

As it turned out, Nadia Carey did not leave Respondent, and Doug Grant transferred to Oatley's section, leaving Oatley with two structural analysts where he had feared he would have none. (TX 117)

After his interview with Oatley, Complainant spoke with Alain Mouyal, a Senior Systems Consultant at Respondent. (scheduled for 3:00 pm, CX 16) Complainant states that, during his technical interview with Mouyal, Mouyal made a specific connection between Complainant, Comanche Peak, and Stone & Webster Engineering. He states that, while looking at Complainant's resume, Mouyal asked if he (Complainant) had worked at Comanche Peak. Complainant stated that he had worked there from 1982-1985. Mouyal then stated that Stone & Webster was at Comanche Peak in 1985. (TX 85)

Complainant's contention is that this "pinpointed" exchange proves Mouyal's knowledge of his prior protected activity, i.e., his ERA action against Nuclear Power Services, et. al., infra. (TX 85-87)

[Page 8]

Alain Mouyal did not testify at the hearing, but provided responses to Complainant's interrogatories. These responses are at Appendix 2 to Complainant's Post-Trial Brief.

Mouyal was a Support Engineer in the PBS Division on December 20, 1995, the time of the technical interview. (CX 16) Mouyal stated that, after his interview, his evaluation of Complainant was that "From my very limited knowledge of Structural Engineering and Pipe Supports, he appeared qualified in these areas. However, [Complainant] lacked CAD experience" (Response to Question 16(b) [Q16(b)])

He stated that, after the interview, he talked with both Haynie and Oatley about Complainant: "I stated to both of them that [Complainant] appeared technically qualified in the Structural engineering area, but that his lack of CAD experience and poor communication skills prevented him from being qualified for the position." [Q16(c)] Mouyal further stated that he had not shared his evaluation of Complainant with anyone "outside Respondent Corporation". [Q16(d)]

Mouyal was not asked, in these interrogatories, about his knowledge of Complainant's prior claims under the ERA. In his May 16, 1996 Affidavit, however, Mouyal stated, "At no time did I ever contact [Complainant's] stated references or his previous employers. Furthermore, I never discussed with [Complainant] any prior litigation or claims brought

by [Complainant]. My evaluation of [Complainant] was limited exclusively to his application and resume as well as his interviews." (CX 15)

Complainant had two additional technical interviews on December 20, 1995. He interviewed with Nadia Carey, a Customer Support Engineer (scheduled for 2:30 p.m., CX 16) and LaVoir Haynie, a Support Manager in Respondent's PBS Division (scheduled for 3:30 p.m., CX 16). Complainant points out that according to the interview schedule (CX 6) he was supposed to meet again with Oatley for a summary, following his interviews with Carey and Haynie. Complainant testified, however, that Oatley entered the room during his interview with Haynie and told him that his summary meeting would not take place, and to see Spray following the interview. (TX 89)

LaVor Haynie testified that he was a Support Manager in the PBS organization at the time he interviewed Complainant. He was responsible for, "running the support organization dealing directly with customer support, dealing with post-sales...[customer] problems and questions." (TX 185) Haynie's technical interview lasted approximately 30 minutes, during which they discussed the nature of the organization and the nature of their product. (TX 186) Haynie recounted some concerns from that interview:

[Page 9]

> He didn't bring himself forward...he wasn't very inquisitive about the type of work we were doing....he was just very agreeable to everything and didn't strive to learn more about the job. I just concluded that he was not aggressive in nature in wanting to find out information and stuff which would be a very critical part of our job ... I wasn't impressed and didn't feel he would be a good fit ... I didn't feel like he had the communications skills that would be necessary to deal with customers on the telephone; I didn't feel like he was aggressive enough to go out and learn all the things that he needed to learn and the pace and rate he needed to learn them.

(TX pp. 186-187)

Nadia Carey did not testify at the hearing, but provided responses to Complainant's interrogatories. These responses are at Appendix 2 to Complainant's Post-Trial Brief.

Carey was, at the time, a customer support engineer at Respondent and was the employee whose position Respondent sought to fill. Carey stated: "I discussed my impression of the interview with Alain Mouyal and Lee Oatley either the day of the interview or the next day. I said that though [Complainant] obviously had a lot of experience in the pipe support analysis field, I did not think it was relevant to our applications." [Q5] Carey also stated that she did not share her technical evaluation about Complainant with anyone outside the Respondent Corporation. [Q15(d)]

Carey stated that she found out that she would be staying with Respondent on December 20, 1995. She stated that she and Doug Grant communicated regularly and

worked closely together in providing "more efficient customer support." [Q18] Carey was not asked in these interrogatories about her knowledge of Complainant's prior claims under the ERA. In her May 16, 1996 Affidavit, Carey stated: "At no time did I ever contact [Complainant's] stated references or his previous employers. Furthermore, I never discussed with [Complainant] any prior litigation or claims brought by [Complainant]. My evaluation of [Complainant] was limited exclusively to his application and resume as well as his interviews." (CX 15)

Complainant met again with Spray after the technical interviews were complete. Complainant testified that Spray told him to call back 8 days later on December 28, 1995. (CX 6) Complainant called Spray on December 28, 1995, and again on January 4, 1996 and January 8, 1996. Each time he was told that a decision had not yet been made. (CX 6) When he called on January 8, Spray told him to call again on January 17. On January 17, Spray told Complainant to call Oatley directly, which he did, several times. Complainant testified that finally, on January 31,

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1996, Oatley told him that Respondent would not offer him a position. (CX 6)

Complainant relies heavily on a document prepared by Respondent, which he obtained pursuant to a Freedom of Information Act request, contained in the record at CX 7. The document is titled "Management Review". At the top it indicates that Complainant's application information was reviewed by Lee Oatley, and the box labeled "desire interview" is checked off. Below that, the form has Lee Oatley listed in the "interviewer" box, and "[check mark] choose better qualified candidate" written in the "Reject - Reason" box. The "Dates" box of the same row on the form with Complainant's rejection reads "12/20/95 12:55 p.m." Complainant argues that this establishes that he had already been rejected at 12:55 p.m., which was before his technical interviews.

According to the five Respondent employees who testified, submitted affidavits or answered interrogatories (Spray, Oatley, Carey, Mouyal and Haynie), none had any knowledge of Complainant's protected activity, and they denied having any knowledge that Complainant had filed claims under the Act in the past.

Complainant's February 6, 1996 complaint filed with the Department of Labor is contained in the record at CX 6. Respondent submitted a letter dated March 28, 1996 to the Department of Labor, setting forth its position concerning the charge. (CX 12) Respondent denied that Complainant was discriminated against in violation of the Act, summarizing that Complainant was not hired because

> [his] experience was too focused and narrow for its broader needs; his communication skills were inadequate and not suited for a position in a customer services organization; he had no experience with CAD; he had limited potential to

learn the piping and equipment portion of the plant design products which were Respondent's highest priority.

(CX 12) "More importantly," Respondent noted, "Respondent was able to satisfy its structural engineering requirements with current Intergraph personnel." (CX 12)

ISSUES

The following issues are presented for resolution:

(1) Whether Complainant is an Employee within the meaning and coverage of the Act;

[Page 11]

(2) Whether Respondent is an Employer within the meaning and coverage of the Act;

(3) Whether Respondent's decision to deny employment to Complainant was based on activities which Complainant engaged in which are protected under the Act.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE 1

WHETHER COMPLAINANT IS AN EMPLOYEE WITHIN THE MEANING AND COVERAGE OF THE ACT

Respondent points out that Complainant was never an actual employee of Respondent, and that cases cited under the Act deal with discharges, not alleged refusals to hire. Respondent thus argues that Complainant "has absolutely no standing under this statute to bring a claim against [Respondent], because he was never an employee." (Respondent's Closing Argument at 26) To the contrary, however, I note that the Secretary of Labor applies the employee protection provisions of the Act to applicants for employment, in addition to employees. *See e.g. Samodurov v. General Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993). I therefore find that Complainant is an "employee" who may properly bring a claim under the employee provisions of the Act based on Respondent's alleged discriminatory failure to hire him.

ISSUE 2

WHETHER RESPONDENT IS AN EMPLOYER WITHIN THE MEANING AND COVERAGE OF THE ACT

Respondent argues that Complainant has not proved that it is an "employer" under the Act, as no evidence was presented showing that it is a licensee or an applicant for a license from the NRC. (See Respondent's Closing Argument at 28)

The Act specifically includes as "employers", "a contractor or subcontractor" to a licensee of the NRC. (42 USC § 5851(a)(2)(C)). (See also Complainant's Closing Argument at 39) The record establishes that Respondent has a wide variety of clients for its computer expertise (TX 247-8), including a specific client in Stone & Webster Engineering Company. (TX p. 129) Stone & Webster is, and has been, a contractor at a number of nuclear power generating plants nationwide. Respondent's relationship with Stone & Webster, relative to the nuclear industry, is as a subcontractor, providing software and technical solutions for Stone & Webster's pipe support problems. (TX pp. 129-30) Thus, I find that Respondent is an employer covered under the Act, as a subcontractor to a licensee of the NRC.

[Page 12]

ISSUE 3

WHETHER RESPONDENT'S DECISION TO DENY EMPLOYMENT TO COMPLAINANT WAS BASED ON ACTIVITIES WHICH COMPLAINANT ENGAGED IN WHICH ARE PROTECTED UNDER THE ACT

Regarding whistleblower cases generally, the Secretary has explained that "[a]fter a case has been fully tried on the merits, the ALJ's job is to weigh all the evidence and decide whether the Complainants have proven by a preponderance of the evidence that Respondent intentionally discriminated against them because of protected activities." *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 & 8 (Sec'y March 4, 1996), slip op. at 4-5 n.1. In order for Complainant to make such a showing, he must prove that the Respondent knew of his protected activities[5] . Complainant may prove Respondent's knowledge by direct or circumstantial evidence, however some evidence is required; mere inference, assertion, or supposition is insufficient. *See Mosley v. Carolina Power & Light Co.*, 94-ERA-23 (ARB August 23, 1996); *Samodurov v. General Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993); *Bartlik v. Tennessee Valley Authority*, 88-ERA-15 (Sec'y Apr. 7, 1993).

I find that Complainant has failed to prove that Respondent or any of its employees were aware of his protected activities. Complainant admitted at the hearing that he never told any Respondent employees about his protected activities (TX 52, 87), and all of Respondent's employees testified credibly (or answered interrogatories) that they were unaware of Complainant's protected activities.

Complainant argues that his case against Nuclear Power Services received a lot of publicity in the local newspaper, and asserts that Alain Mouyal may have read about it. (TX 40) This assertion is entirely speculative and unsubstantiated. Mouyal responded, by interrogatory answer, that he never read about Complainant's case, and had no knowledge of it. Complainant also argues that Mouyal asked questions during his technical interview which prove his knowledge of Complainant's protected activities. Mouyal's questions, however, were based on information clearly contained in Complainant's own resume. His

questions suggest no knowledge of Complainant's protected activity. Finally, Mouyal states that he did not contact any of Complainant's previous employers and did not discuss Complainant's previous litigation with him. Complainant's assertion that Mouyal knew of his protected activity is completely unsubstantiated by any credible evidence, direct or circumstantial.

As for the most crucial piece of evidence upon which Complainant relies, the Management Review Form (CX 7), I find that it proves nothing. More specifically, it does not show that Complainant was rejected before he was interviewed. Spray

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testified credibly that he first dated the form on October 17, 1995 when he initially received Complainant's resume and the supporting documents. (TX 213) Spray explained that the notations show that Complainant's interview was scheduled to begin at 12:55 p.m. on December 20. Finally, Spray explained that the reason for Complainant's rejection was not entered into the form until late January, when Oatley told Complainant that he would not be extended an offer. In light of this credible explanation by Oatley, I find that Complainant's Exhibit 7 does not establish that Complainant was rejected prior to the interviews, nor that he was rejected because of his protected activities.

Oatley also testified credibly regarding the importance which Respondent placed on telephone and communication skills in filling the position. (TX 147-148) He testified that at the time Complainant was interviewed, Respondent had not yet determined that Carey would be continuing her employment and that Doug Grant would be transferred to the PBS division.

Additionally, even if Complainant had established that Respondent knew about his protected activity and that his protected activity was *a motivating factor* in the decision not to hire him (which, I have found, has not been established), Respondent has presented "clear and convincing evidence" that Complainant would not have been hired in the absence of his protected activity. See 42 U.S.C. § 5851(b)(3)(D). Specifically, the record is clear that Respondent did not wind up hiring an outside person for the position; Carey remained at the position and Grant was transferred and assists her with her duties. As Respondent's witnesses explained, credibly, even if Respondent had found Complainant qualified, Respondent nonetheless would have filled the position internally rather than hire Complainant, once they discovered that retaining Carey was an option. (TX 117, 160-164) I find this to be clear and convincing evidence that, even if Complainant was able to prove that his protected activity was a motivating factor, Respondent would not have hired him for the position in any event.[6] *See Johnson v. Bechtel Const. Co.*, 95-ERA-11 (Sec'y September 28, 1995).

In summary, Complainant has failed to establish that any of Respondent's employees were aware of his protected activities. All five of Respondent's employees testified credibly that they had no such knowledge, and Complainant admitted he never told them

about his protected activities. The "pinpointed" questions by Mouyal, upon which Complainant relies, were based on information provided in Complainant's resume, which contains no indication of his protected activities. The Management Review form, upon which Complainant relies upon most heavily, in light of Spray's testimony, does not establish that Complainant had been rejected before he was interviewed. Finally, Respondent has presented clear and convincing evidence that

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[Page 14]

Complainant would not have been hired even if he had been qualified, since Respondent was able to fill the vacancy internally.

Complainant has therefore failed to establish entitlement to any relief under the whistleblower protection provisions of the ERA.

RECOMMENDED ORDER

Based on the foregoing, it is recommended that the complaint of **SYED M. A. HASAN** be **DENIED** in its entirety.

PAUL H. TEITLER
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978.

[ENDNOTES]

[1] The following references are used herein: "CX" is used to denote Claimant's Exhibit; "RX" is used to denoted Respondent's Exhibit; and "TX" is used to denote Hearing Transcript.

[2] Complainant apparently determined to pursue employment with Respondent on his own; it does not appear that there were any publicized job vacancy announcements.

[3] Oatley testified that he is now an Executive Manager in the PBS Product Center for Respondent. (TX 101)

[4] Oatley explained the work activities which the structural resource person filling Nadia Carey's position would be responsible for:

> There are three discrete activities that analysts might be involved with: one is testing new software to make sure that it works the way the structural engineer would want it to work; two is being able to train new users on the use of the software package; and three would be the ongoing technical support conducted primarily by telephone when customers encounter problems after they are using the software.

(TX 106).

[5] I note that Respondent has not conceded that Complainant established that he engaged in protected activity. I find, however, that the record establishes Complainant's history of protected activity, including the filing of several previous whistleblower claims under the Act. Regardless of whether Complainant established any protected activities to substantiate his prior claims, the mere fact that he has brought such claims is sufficient protected activity on which he may base the instant claim.

[6] I therefore find it unnecessary to resolve any conflict regarding Complainant's actual qualification for the position, i.e., the conflict over whether Complainant truly had sufficient CAD experience and sufficient communication skills.